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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1967

No. 1129

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ATLANTIC INSURANCE COMPANY, COMMERCIAL INSURANCE COMPANY, COMMERCIAL STANDARD INSURANCE COMPANY, EMPLOYERS CASUALTY COMPANY, GENERAL INSURANCE CORPORATION, GULF INSURANCE COMPANY, HOUSTON FIRE AND CASUALTY INSURANCE COMPANY, INTERNATIONAL SERVICE INSURANCE COMPANY, MARATHON INSURANCE COMPANY, NATIONAL STANDARD INSURANCE COMPANY, REPUBLIC INSURANCE COMPANY, SECURITY NATIONAL INSURANCE COMPANY, SOUTHERN INSURANCE COMPANY, SUPERIOR INSURANCE COMPANY, TRANSPORT INSURANCE COMPANY, TRINITY UNIVERSAL INSURANCE COMPANY, UNITED SERVICES AUTOMOBILE ASSOCIATION, VANGUARD INSURANCE COMPANY,

Appellants,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal from the Court of Appeal of the State of California, First Appellate District, Division Four

BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS OR AFFIRM

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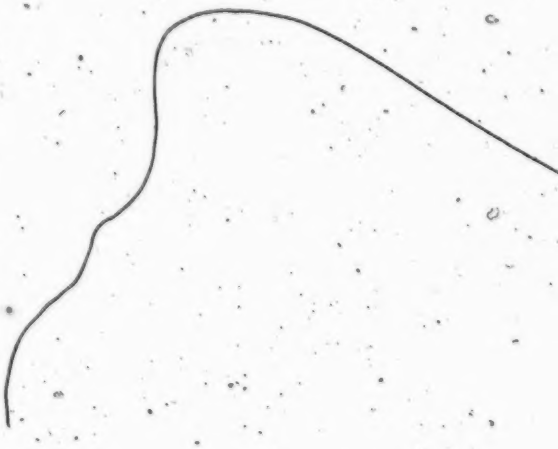

Table of Authorities Cited

Cases	Pages
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Appellee attempts to sustain the decision below on the authority of the McCarran Act (15 USC §§1011-1015),

Prudential Ins Co v Benjamin (1946) 328 US 408, and *Prudential Ins Co v Hobbs* (1946) 328 US 828. The statute and cases mentioned merely hold that any *general* attack on state taxation of insurance because insurance is interstate commerce will not be allowed. But these authorities do not validate what would have been unconstitutional prior to *United States v South-Eastern Underwriters Association* (1944) 322 US 533.

Prudential v Benjamin decides no more than had already been decided in *Lincoln National Life Ins Co v Read* (1945) 325 US 673 [see footnote 40 of *Prudential v Benjamin*]. *Prudential v Hobbs* was factually the same as *Fire Association of Philadelphia v New York* (1886) 119 US 110 [note Justice Harlan's dissent in the *Fire Association* case]. *Fire Association* holds that retaliatory taxes are only constitutional where imposed as a condition for the admission of the insurer into the state. *Hanover Fire Ins Co v Carr* (1926) 272 US 494 decides that when a foreign insurer has been admitted to a state unconditionally it may not later be discriminated against. *Hanover* was not affected by the McCarran Act.

Reserve Life Ins Co v Bowers (1965) 380 US 258 and *State Board of Ins v Todd Shipyards* (1962) 380 US 451 clearly establish that the McCarran Act did not foreclose constitutional attack on state tax measures where an insurer is involved.

Appellee argues that while ad valorem taxes on property may not be discriminatory there is no constitutional prohibition against discriminatory franchise taxes. *Southern Railway Co v Greene* (1910) 216 US 400 was a case involving a discriminatory franchise tax, and it was held

unconstitutional. *Southern Railway* was relied upon by this Court in *Hanover,* discussed supra, so there is no merit in the distinction appellee seeks to make. The key question is whether the foreign company has been unconditionally admitted to do business in the state [not disputed here], and if it has, discrimination against the foreign insurer is unconstitutional.

Appellee points to the fact that 47 states have retaliatory laws. We do not challenge the constitutionality of these laws except to the extent that they are applied to foreign insurers which have been unconditionally admitted to a state. The large number of states which have such laws points up the potential seriousness of the constitutional problem involved.

DATED: 22 March 1968.

Respectfully submitted,

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